No. 80-1772

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

v.

ULECIOUS BUCHANAN,
Respondent.

REPLY BRIEF

JOHN B. GUNN
JAMES CHRISTOPHER COOK
WALKER AND WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Attorneys for Petitioner

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INTRODUCTION

Respondent's response to the petition for writ of certiorari does not seriously challenge any of the grounds petitioner has advanced in support of the petition.

First, and most significantly, the response does not deny that this Court possesses a self-imposed obligation to closely scrutinize all cases brought under the Federal Employers' Liability Act where it appears that the litigants have been improperly deprived of the jury's determination. Second, the response does not dispute that the facts of this case, as recited in petitioner's statement of the case, are accurate. It is thus admit-

ted that respondent's attorney failed to properly and timely object to the testimony of Dennis Korando which was, belatedly, said to be prejudicial. The response merely excuses respondent's attorneys' failure to utter a specific and timely objection on grounds of prejudice as an additional objection which was implicit in his objection that he was surprised by the appearance of Dennis Korando as a witness at trial. Finally, the response is patently misleading insofar as it implies that the unpublished order of the Illinois Appellate Court could not be appealed to the Illinois Supreme Court. As will be further described herein, appeal to the Illinois Supreme Court is expressly authorized by an amendment to the Rules of the Illinois Supreme Court and by a decision of that Court more recent than the case relied upon by respondent.

Respondent's other arguments in defense of the order of a new trial have been previously addressed in the petition for writ of certiorari.

I. Respondent Does Not Contest The Fact That His Attorney Repeatedly Employed Offensive Racial Characterizations In Front Of The Jury, While Neither Racial References Nor Offensive Characterizations Were Made In Front Of The Jury By Petitioner Railroad's Attorney.

The response refers to conversations occurring in chambers between the trial judge, respondent's attorney and petitioner's attorney without making it clear that the use of language like "fag" and "creature" was not used by the court in front of the jury. The response does not even acknowledge that these offensive sexual and racial characterizations were first employed by him. It is evident from the record that neither the trial judge nor petitioner railroad's counsel engaged in offensive language before the jury. In contrast, however, respondent's attorney repeatedly characterized the person waiting for respondent outside the railroad yard as a "creature" and "black thing." (R.

365-368) Respondent does not dispute the fact that such references were never made in front of the jury by petitioner railroad's attorney. (R. 392-393, 406-407 & 421) In short, this Court should be aware of the fact that the offensive characterizations described in the response were not made in front of the jury — except for the offensive characterizations employed by respondent's own attorney.

II. The Illinois Supreme Court Was Properly Petitioned For Leave To Appeal And This Court's Jurisdiction Is Properly Invoked Under 28 U.S.C. §1257(3).

The response implies that neither the Illinois Supreme Court nor this Court have jurisdiction to hear an appeal of the order of a new trial. Respondent's contention, however, is false. Illinois Supreme Court Rule 315(a) (Ill.Rev.Stat. 1979, ch. 110A, par. 315(a)) provides that petitions for leave to appeal from the Illinois Appellate Court to the Illinois Supreme Court may be filed by any party "* * * in any case not appealable from the Appellate Court as a matter of right." In the instant case, pursuant to Illinois Supreme Court Rule 306 (Ill.Rev.Stat., 1979, ch. 110A, par. 306), the appellate court granted the railroad's petition for leave to appeal from an order granting a new trial. Illinois Supreme Court Rule 306 does not establish the mechanism whereby a litigant may appeal from the appellate court's determination to the Illinois Supreme Court. That mechanism is provided under Rule 315(a).

The case relied upon by respondent, *Kavanaugh* v. *Washburn*, 387 Ill. 204, ____, 56 N.E.2d 420, 423 (1944), construed predecessors of Illinois Supreme Court Rules 315(a) and 306, and held that there was no appeal from the Illinois Appellate Court to the state Supreme Court relative to affirmances of orders granting new trials. See also *Hall* v. *Chicago & Northwestern Ry. Co.*, 5 Ill.2d 135, ____, 125 N.E.2d 77, 84 (1955). More recently, however, the Illinois Supreme Court distinguished *Kavanaugh* and *Hall* saying that the current Supreme Court

Rules abolished the arduous procedural course charted in those cases. *Robbins* v. *Professional Construction Co.*, 72 Ill.2d 215, ____, 20 Ill.Dec. 577, 579-580, 380 N.E.2d 786, 788-789 (1978). In *Robbins,* the Supreme Court noted that under the current rules, once the appeal process has ended relative to appeal of an order granting a new trial, later appeals cannot address the propriety of the trial court's initial grant of a new trial. Thus, under Illinois Supreme Court Rule 315(a) and the *Robbins* case, the Illinois Supreme Court does indeed have jurisdiction to accept an appeal concerning issuance of a new trial order. The jurisdiction is expressly confirmed as part of the general discretionary jurisdiction of the Illinois Supreme Court. In cases where there is a direct appeal of a new trial order, as is the case here, there can be no relitigation of the issue of whether the allowance of a new trial was appropriate. Of significance to this Court is the fact that there can be no relitigation of the question of whether or not the factfinding of the jury was improperly overthrown by the trial court's allowance of a new trial, even though the alleged error on which that order was based was waived by not being timely objected to at trial.

Because the Illinois Supreme Court had jurisdiction to hear this appeal under Illinois Supreme Court Rule 315(a) and under the *Robbins* case, it is readily apparent that the decision of the Illinois Appellate Court constituted a final judgment under 28 U.S.C. §1257(3). *Miranda* v. *Arizona,* 384 U.S. 436, 498, 86 S.Ct. 1602, ____, 16 L.Ed.2d 694, 737 (1966).

III. The Questions Are Important.

The response contends that this case does not present special and important reasons for granting the writ. In essence, respondent contends that the trial court had broad discretion in ordering the new trial and that such an exercise of discretion is not reviewable by this Court. On the contrary, as numerous decisions of this Court state, the litigant's right to jury trial will be

jealously guarded by this Court which will exercise its power of review in any case where it appears that the litigants have been improperly deprived of the jury determination. E.g., *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, ____, 1 L.Ed.2d 493, 501 (1957). The ground relied upon by the trial court in ordering a new trial was entirely waived by respondent's failure to object to the allegedly prejucial testimony of Dennis Korando or to urge the specific ground of prejudice in opposition to Korando's testimony. Waiver also indicates that the supposed prejudice was neither apparent to the Court and counsel at the time Korando testified nor was present in the record. Such failures by respondent's attorney have been held sufficient to negate any allegation of error before this Court. *Estelle* v. *Williams*, 425 U.S. 501, 509-513, 96 S.Ct. 1961, ____, 48 L.Ed.2d 126, 134-135 (1976). Finally, this case presents an important question in that the intended scope of judicial supervision of jury verdicts in FELA cases or the enunciation of meaningful standards to guide the lower courts in the exercise of their supervisory function have never been announced by this Court. This case squarely presents this important issue whose time has come. *Harris* v. *Pennsylvania R.R. Co.*, 361 U.S. 15, 27-28, 80 S.Ct. 22, ____, 4 L.Ed.2d 1, 9 (1959) (dissenting opinion of Mr. Justice Harlan).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, petitioner respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

John B. Gunn
James Christopher Cook
Walker and Williams, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Attorneys for Petitioner

June, 1981